

1 Clarisse Chung (SB#260894)
2 Crossroads Legal Group
3 800 W. El Camino Real Ste 180
4 Mountain View, CA 94040
(650) 332-4905
clarisse@crossroadslegalgroup.com
5 Attorneys for Plaintiff

6 Michael Yesk (SB#130056)
7 Yesk Law
8 70 Doray Drive, Suite 16
9 Pleasant Hill, CA 94523
(925) 849-5525
yesklaw@gmail.com
10 Attorneys for Plaintiff

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 GEORGE B. NOBLE AND PATRICIA L. NOBLE,) Case No. 4:17-cv-01053-CW
14 Plaintiff,)
15 v.) **PLAINTIFF'S OPPOSITION TO
16 DEFENDANT CALIBER HOME LOANS,
17 INC. AND U.S. BANK TRUST, N.A.'S
18 MOTION TO DISMISS COMPLAINT**
19 CALIBER HOME LOANS, INC.; U.S. BANK)
20 TRUST, N.A. AS TRUSTEE FOR LSF9) Hearing: May 2, 2017
21 MASTER PARTICIPATION TRUST; LSF9) Time: 2:30 p.m.
22 MORTGAGE HOLDINGS, LLC; CLEAR) Place: Courtroom 2 – 17th Floor
RECON CORP.; BANK OF AMERICA,)
N.A.; and DOES 1-10, INCLUSIVE,)
Defendants) Hon. Claudia Wilken
23)
24)
25)
26)

Table of Contents

1	Table of Authorities	3
2	Cases 3	
3	Statutes 3	
4	Other Authorities	3
5	Memorandum of Points and Authorities.....	5
6	Introduction.....	5
7	Factual Background and Procedural History	5
8	Standard of Review	8
9	Discussion.....	8
10	I. Plaintiffs' Claims Are Not Barred by Res Judicata	8
11	II. Plaintiffs Have Stated Facts Sufficient to State a Claim for RESPA Violations	11
12	III. Plaintiff Has Stated Facts Sufficient to State a Cause of Action for Wrongful	
13	Foreclosure	14
14	IV. Plaintiff Has Stated Facts Sufficient to State a Cause of Action for Violations of	
15	California Civil Code § 2924.17	17
16	Conclusion.....	18
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		

Table of Authorities

1 Cases

2	<i>Ashcroft v. Iqbal</i> , 129 U.S. 1937, 1949 (2009)	3
3	<i>Barriónuevo v. Chase Bank, N.A.</i> (N.D. Cal. 2012) 885 F.Supp.2d 964.....	7, 8
4	<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544, 557 (2007).....	3
5	<i>Castillo v. Skoba</i> , 2010 WL 3986953	7
6	<i>Dimock v. Emerald Properties, Inc.</i> (2008) 81 Cal.App.4th 868	10
7	<i>Glaski v. Bank of America, N.A.</i> , (2013) 218 Cal. App. 4th 1079	8
8	<i>Gomes v. Countrywide</i> , 192 Cal.App.4th 1149, 1154 (2011).....	7
9	<i>Herrara v. Deutsche Bank National Trust Co.</i> (2011) 196 Cal.App.4th 1366	8
10	<i>Javaheri v. JP Morgan Chase Bank, N.A.</i> (C.D. Cal. June 2, 2011, No. CV10-08185ODW) 2011	
11	U.S. Dist. Lexis 62152.....	8
12	<i>Jolley v. Chase Home Finance, LLC</i> (2013) 213 Cal. App. 4th 872	4
13	<i>Lee v. City of Los Angeles</i> , 250 F.3d 668	9, 11
14	<i>Lona v. Citibank, N.A.</i> (2011) 202 Cal. App. 4th 89	10
15	<i>Monterossa v. Superior Court of Sacramento County</i> (2015) 237 Cal. App. 4th 747	4, 5
16	<i>Newsom v. Countrywide Home Loans, Inc.</i> , 714 F.Supp.2d 1000.....	9, 11
17	<i>Ohlendorf v. Am. Home Mortg. Servicing</i> (E.D. Cal. 2010) 279 F.R.D. 575	8
18	<i>Sacchi v. Mortgage Electronic Registration Systems, Inc.</i> (C.D. Cal. 2011) 2011 WL 2533029 .	7
19	<i>Tamburri v. Suntrust Mortgage, Inc.</i> (N.D. Cal. 2011) 2011 WL 6294472	7, 10

21 Statutes

22	Cal. Civ. Code § 2924.17.....	
----	-------------------------------	--

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs GEORGE B. NOBLE AND PATRICIA L. NOBLE (“Plaintiffs”) hereby submits this opposition to Defendants CALIBER HOME LOANS, INC. (“Caliber” or “Defendant”) and U.S. BANK TRUST, N.A. AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST’s (“U.S. Bank” or “Defendant”) Motion to Dismiss Plaintiff’s Complaint (“Motion”). Plaintiffs maintain that they have stated valid claims for wrongful foreclosure, violations of the California Homeowner Bill of Rights (“HBOR”), and violations of the Real Estate Settlement Procedures Act (“RESPA”) by Defendants. Plaintiffs’ Complaint alleges multiple, specific factual bases indicating that Defendants lack standing to foreclose and violated RESPA provisions requiring them to respond to Plaintiffs’ requests for information. As such, Defendants’ Motion should be denied.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs' Complaint ("Complaint") arises out of Defendants' violations of provisions of the Real Estate Settlement Procedures Act ("RESPA") and the wrongful actions taken by Defendants in their attempts to foreclose upon real property purchased by Plaintiffs. On or around 2007, Plaintiffs took out a loan with the now-defunct Countrywide Home Loans, Inc. ("Countrywide") secured by real property located at 56 Hennessey Ridge Road, St. Helena, California 94574 ("Subject Property").

On or around November 22, 2011, Mortgage Electronic Registration Systems, Inc. (“MERS”) recorded a Corporation Assignment of Deed of Trust, assigning all beneficial interest in Plaintiffs’ DOT together with the note to Defendant Bank of America, N.A. (“BANA” or “Defendant”). On or around November 6, 2014, Michael D. Fitts as a purported “Assistant Vice President” of BANA executed an Assignment of Deed of Trust in which BANA purported to assign all beneficial interest in Plaintiffs’ DOT to LSF9 Mortgage Holdings, LLC. Though “Bank of America, N.A.” was printed on the signature line of the Assignment of Deed of Trust, “Michael D. Fitts” and “Assistant Vice President” were handwritten on the document.

1
 2 On November 7, 2014, Plaintiffs sent BANA a qualified written request for information
 3 under 12 U.S.C. 2605(e) and 12 C.F.R. 1024.36. Among other things, Plaintiffs sought
 4 information relating to the identity of the owner of their mortgage; the transfer history of their
 5 loan; and their servicing file. BANA's response to Plaintiffs' request for information ("RFI")
 6 contained numerous deficiencies, including but not limited to the following: BANA failed to
 7 supply Plaintiffs with the name, address and telephone number of the trustee overseeing the
 8 issuing entity; BANA failed to supply Plaintiffs with the name, address, telephone number, and
 9 position of an officer under the trustee's employ; and BANA did not provide Plaintiffs with a
 10 loan identification number that was assigned to their loan and through which the trustee would
 11 recognize Plaintiffs' loan account.

12 BANA also refused to supply information relating to the transfer history of Plaintiffs'
 13 loan by failing to respond to Plaintiffs' request for the MERS MIN Summary and a MERS
 14 Milestones Report. This is despite the fact that Plaintiffs informed BANA in its RFI that
 15 Plaintiffs were unable to find their loan on the MERS system using the MIN number listed on
 16 their Deed of Trust.¹ BANA's response to Plaintiffs' request for information regarding their
 17 servicing file was also incomplete. Among other things, BANA refused to send a servicing file
 18 that reflected the most recent data and sent outdated servicing notes that did not even reflect the
 19 fact that Plaintiffs had engaged BANA for loss mitigation review. Some information and
 20 documents provided only covered activity on Plaintiffs' account up to January 1, 2014.

21 On November 20, 2014, Plaintiffs – who had been informed that Defendant Caliber
 22 Home Loans, Inc. ("Caliber" or "Defendant") was the new servicer of their loan – sent Caliber a
 23 request for information under 12 U.S.C. 2605(e) and 12 C.F.R. 1024.36. Among other things,
 24 Plaintiffs sought information relating to the identity of the owner of their mortgage; the transfer

25
 26¹ Though Plaintiffs were able to find what appeared to be their Deed of Trust on the MERS system by performing a
 searching using George Noble's social security number and property zip code, the record number associated with
 that MIN was *not* the MIN listed on Plaintiffs' Deed of Trust.

1 history of their loan; and their servicing file. Caliber's response was due on December 8, 2014
 2 but was not mailed by Caliber until December 31, 2014. Caliber's response to Plaintiffs' RFI
 3 also contained numerous deficiencies, including but not limited to the following: Caliber failed
 4 to supply Plaintiffs with the name, address, telephone number, and position of an officer under
 5 the trustee's employ; and Caliber did not provide Plaintiffs with a loan identification number that
 6 was assigned to their loan and through which the trustee would recognize Plaintiffs' loan
 7 account. Caliber also refused to supply information relating to the transfer history of Plaintiffs'
 8 loan by failing to respond to Plaintiffs' request for the MERS MIN Summary and a MERS
 9 Milestones Report. Though Caliber stated in its letter that it would contact Plaintiffs' prior
 10 servicer and send supplemental information once it had been obtained from the prior servicer,
 11 Plaintiffs received no further communication from Caliber regarding this request.

12 Caliber's response to Plaintiffs' request for information regarding their servicing file was
 13 also incomplete. Among other things, Caliber refused to send a servicing file that reflected the
 14 most recent data and refused to provide some of the information Plaintiffs requested related to
 15 the Transaction History on their loan. In response to Plaintiffs' request for information regarding
 16 the owner of their mortgage, Caliber claimed that the investor of Plaintiffs' loan was U.S. Bank
 17 Trust, N.A. as Trustee for LSF9 Master Participation Trust.

18 Plaintiffs allege on information and belief that the LSF9 Master Participation Trust was
 19 merely a participation agent to the securitization of Plaintiffs' loan. As such and based on an
 20 investigation Plaintiffs had conducted on the ownership of their loan, Plaintiffs further allege that
 21 the LSF9 Master Participation Trust is not the beneficiary of Plaintiffs' deed of trust because it
 22 does not own the entirety of Plaintiffs' loan but rather only a forward interest in its servicing
 23 rights. Plaintiffs allege information and belief that the LSF9 Master Participation Trust therefore
 24 lacks the authority and standing to initiate foreclosure proceedings on Plaintiffs' home.

25 Notwithstanding this fact, the LSF9 Master Participation Trust has been attempting to
 26 foreclose on the Subject Property. On or around, February 10, 2017, Plaintiffs received a notice
 of trustee's sale.

1

2 **III. STANDARD OF REVIEW**

3 Under Federal Rule of Civil Procedure 12(b)(6), a Motion to Dismiss tests the ability of a
 4 complaint to allege facts sufficient to state a plausible claim for relief. *Bell Atlantic Corp. v.*
 5 *Twombly*, 550 U.S. 544, 557 (2007). A complaint that contains sufficient factual allegations “to
 6 raise a right to relief above the speculative level” will survive a motion to dismiss. *Id.* A
 7 complaint must state a claim that is facially plausible, requiring facts showing more than a sheer
 8 possibility that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 129 U.S. 1937, 1949 (2009).
 9 “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to
 10 draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* In
 11 evaluating whether a complaint meets this standard, the court is not required to assume the truth
 12 of Plaintiff’s legal conclusions but must take Plaintiff’s factual allegations as true, and then
 13 “determine whether they plausibly give rise to an entitlement to relief.” *Id.* at 1950.

14 **IV. DISCUSSION**

15 **A. Plaintiffs’ Claims Are Not Barred by Res Judicata**

16 Contrary to Defendants’ assertion in their Motion, Plaintiffs’ claims are not barred by *res*
 17 *judicata*. First, Defendants do not even apply the correct standard to determine if Plaintiffs’
 18 claims are barred. Defendants choose to focus on an esoteric claim preclusion standard when it is
 19 well-established that California’s *res judicata* standards are governed by the “primary rights”
 20 doctrine. Second, even under the terms of the standard referenced by Defendants, it is clear that
 21 Plaintiffs are not estopped from bringing their current claims.

22 To determine the preclusive effect of a state court judgment federal courts look to state
 23 law. *Palomar Mobilehome Park Ass’n v. City of San Marcos*, 989 F.2d 362, 364 (9th Cir.1993).
 24 “California’s res judicata doctrine is based on a primary rights theory.” *Manufactured Home*
 25 *Communities, Inc. v. City of San Jose*, 420 F.3d 1022, 1032 (9th Cir. 2005). As explained by the
 26 California Supreme Court, the primary rights theory “[p]rovides that a ‘cause of action’ is
 comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant,

1 and a wrongful act by the defendant constituting a breach of that duty.” *Mycogen Corp. v.*
 2 *Monsanto Co.*, 28 Cal.4th 888, 904 (2002). “The most salient characteristic of a primary right is
 3 that it is indivisible: the violation of a single primary right gives rise to but a single cause of
 4 action.” *Id.* Put another way, “one injury gives rise to only one claim of relief.” *See Lincoln*
 5 *Prop. Co. N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 912.

6 In interpreting the primary rights doctrine, California courts have further, explicitly stated
 7 that merely alleging that the same facts are involved in both suits is neither conclusive nor
 8 determinative of the “primary rights” analysis. *San Diego Police v. San Diego Retirement*
 9 *System*, 568 F. 3d 725, 734 (9th Cir. 2009). To the contrary, numerous courts in California have
 10 held that “*different* primary rights may be violated by the *same* wrongful conduct.” *Id.*; *see also*
 11 *Agarwal v. Johnson*, 25 Cal.3d 932, 954-955 (1979) (seminal case holding that the same
 12 wrongful conduct gave rise to both independent federal statutory rights and to state law tort
 13 causes of action); *Branson v. Sun-Diamond Growers of Cal.*, 24 Cal.App.4th 327, 342 (1994)
 14 (explaining that there could be situations where separate and distinct primary rights could be
 15 invaded by one and the same wrong and distinguishing statutory rights from contractual or quasi-
 16 contractual rights). In these cases, *two causes of action* would result. *Branson, supra*, 24
 17 Cal.App.4th at 342, citing Pomeroy, *Code Remedies*, § 350, p. 535.

18 Applying these principles to the case at bar, it is clear that Plaintiffs’ present claims are
 19 not barred by their previous state court lawsuits as neither of their previous claims involved the
 20 same primary rights. Plaintiffs’ present Complaint sounds in Defendants’ violations of
 21 requirements placed upon them by the Real Estate Settlement Procedures Act (“RESPA”) as
 22 codified in 12 U.S.C. 2605 and in Defendants’ attempts to foreclose on Plaintiffs’ home despite
 23 lacking standing to do so. At issue in these claims are: (1) Plaintiffs’ rights under 12 U.S.C. 2605
 24 to receive timely and responsive responses to the qualified written requests (“QWRs”) they
 25 propounded on Defendants; and (2) Plaintiffs’ rights to not be foreclosed upon by entities that
 26 lack standing to do so. Significantly, each of the rights invoked by Plaintiffs in their Complaint
 are distinct from the rights invoked in their previous state court lawsuits.

1 On April 7, 2015, Plaintiffs filed a complaint in Napa County Superior Court, Case No.
 2 26-66217, seeking to exercise their right to rescind their loan under 15 U.S.C. § 1635(a).
 3 Plaintiffs also invoked various rights under the California Homeowner Bill of Rights (“HBOR”),
 4 enacted by the California Legislature, in 2013 – including their right to a single point of contact
 5 in a loan modification review, their right to receive certain documentation informing them of
 6 their right to request documents from their mortgage servicer, their right to not be dual tracked
 7 by their servicer during the pendency of a loan modification review, and their right to have their
 8 mortgage servicer document its right to foreclose. *See* Exh. F to Defendants’ Request for Judicial
 9 Notice In Support of Motion to Dismiss (“Def. RJN”). None of these rights are at issue in the
 10 present case. The only right at issue which may connote a possibility of overlap is Plaintiffs’
 11 right to be free from the practice of robo-signing under California Civil Code Section 2924.17
 12 (“Section 2924.17”). However, even with respect to this right, what was litigated in the 2015
 13 lawsuit was the execution of a substitution of trustee that took place on April 4, 2014. In contrast,
 14 the robo-signing at issue in the present case was the Assignment of Deed of Trust purportedly
 15 executed by Defendant BANA in favor of Defendant LSF9 Mortgage Holdings, LLC, on
 16 November 6, 2014. As such, though the primary right at issue was the same, there were two
 17 distinct and separate legal wrongs – Defendants’ violation of Section 2924.17 when they
 18 executed the substitution of trustee and its violation of Section 2924.17 when they executed an
 19 assignment of deed of trust. This gave rise to *two causes of action*. *See Branson, supra*, 24
 20 Cal.App.4th at 339 (discussion situations where a single primary right could be invaded by two
 21 distinct and separate legal wrongs thereby yielding two causes of action).

22 Similarly, on August 24, 2015, Plaintiffs brought another state court lawsuit when, during
 23 the pendency of an active loan modification review, Defendants dual tracked their loan by
 24 continuing to proceed with foreclosure proceedings on Plaintiffs’ home. *See* Def. RJN, Exh. G.
 25 These were the only facts at issue in Plaintiffs’ second lawsuit and the primary right at issue was
 26 Plaintiffs’ right to be free from such conduct under California Civil Code Section 2923.6
 (“Section 2923.6”) – the HBOR provision that prohibits dual tracking. Neither the facts nor the

1 primary rights at issue in that lawsuit are identical to those raised in Plaintiffs' present claims. As
 2 such, this lawsuit does not serve to bar Plaintiffs' Complaint on *res judicata* grounds either, and
 3 Defendants' arguments are in error.

4 Finally, even putting the primary rights analysis aside, application of the anomalous *res
 5 judicata* standards invoked by Defendants in their Motion, would nonetheless yield the same
 6 result. Defendants' own collateral estoppel standards require that the claims brought in a
 7 subsequent lawsuit be *identical* to the issues litigated in the prior proceeding. Notably,
 8 Defendants' Motion does not engage in any analysis comparing the issues in the present
 9 proceeding as opposed to the prior proceeding. This is likely because the issues in Plaintiffs'
 10 prior litigation and the current litigation are entirely disparate. Neither of Plaintiffs' lawsuits
 11 litigated the issue of Defendants' RESPA violations nor the issue of Defendants' attempts to
 12 wrongfully foreclose on Plaintiffs' home.

13 As such, Plaintiffs' claims are not barred by *res judicata* and Defendants' Motion should
 14 be denied.

15 **B. Plaintiffs Have Stated Facts Sufficient to State a Claim for RESPA Violations**

16 Plaintiffs' Complaint has stated facts sufficient to state causes of action for Defendants'
 17 violations of 12 U.S.C. § 2605 ("RESPA" or "§ 2605"). As stated in Plaintiffs' Complaint, on
 18 November 20, 2014, Plaintiffs submitted qualified written requests ("QWRs"), also known as
 19 requests for information ("RFI"), to Defendant Caliber, pursuant to RESPA and 12 C.F.R.
 20 1024.36. Under § 2605(e), if any "servicer of a federally related mortgage loan receives a
 21 qualified written request from the borrower (or an agent of the borrower) for information relating
 22 to the servicing of such loan, the servicer shall provide a written response acknowledging receipt
 23 of the correspondence within 5 days," and, not later than 30 days after receipt of the QWR,
 24 "provide the borrower with a written explanation or clarification that includes – (i) information
 25 requested by the borrower or an explanation of why the information requested is unavailable or
 26 cannot be obtained by the servicer; and (ii) the name and telephone number of an individual
 employed by, or the office or department of, the servicer who can provide assistance to the

1 borrower.” 12 U.S.C. § 2605(e)(1) and (2). In pertinent part, RESPA defines a QWR as “written
 2 correspondence...that (i) includes, or otherwise enables the servicer to identify, the name and
 3 account of the borrower; and (ii)... provides sufficient detail to the servicer regarding other
 4 information sought by the borrower.” 12 U.S.C. (e)(1)(B).

5 In determining whether or not a request is a QWR that will trigger a servicer’s §
 6 2605(e)’s duty to respond, the Ninth Circuit has followed the precedent set in the Seventh Circuit
 7 decision in *Catalan v. GMAC Mortgage Corp.*, 629 F.3d 676 (7th Cir.2011), in holding that
 8 “RESPA does not require any magic language before a servicer must construe a written
 9 communication from a borrower as a qualified written request and respond accordingly.”
 10 *Medrano v. Flagstar Bank, FSB*, 704 F.3d 661, 666 (9th Cir. 2012). Rather, so long as a
 11 borrower’s written inquiry “(1) reasonably identifies the borrower’s name and account, (2) either
 12 states the borrower’s ‘reasons for the belief ... that the account is in error’ or ‘provides sufficient
 13 detail to the servicer regarding other information sought by the borrower,’ and (3) seeks
 14 ‘information relating to the servicing of [the] loan,’” it triggers the servicer’s obligation to
 15 respond. *Id.*

16 In Defendants’ Motion, they notably do not deny that they provided incomplete responses
 17 to Plaintiffs’ November 20, 2014 QWR. Rather, they attempt to skirt liability for their
 18 noncompliance with the express terms of § 2605(e) by claiming that certain portions of
 19 Plaintiffs’ inquiry did not merit a response because they did not relate to the servicing of
 20 Plaintiffs’ loan. Def. Mtn. at p. 9. Specifically, Defendants turn to the definition of “servicing” in
 21 § 2605(i) – namely, the “receiving any scheduled periodic payments from a borrower pursuant to
 22 the terms of any loan... and making the payments of principal and interest and such other
 23 payments with respect to the amounts received from the borrower as may be required pursuant to
 24 the terms of the loan.” 12 U.S.C. § 2605(i)(3). Using this definition, Defendants then read §
 25 2605(e) to mean that a QWR only requires a response where the borrower inquiry relates only to
 26 *payments* made by the borrower. *See* Def. Mtn. at p. 9. This interpretation is disingenuous as it
 artificially narrows the definition of “servicing” in a way that is inconsistent with both the

1 framework of the statute itself and with the overall legislative purposes behind the enactment of
 2 RESPA, which was intended to be “‘construed liberally’ to serve the statute remedial purpose.”
 3 *Medrano, supra*, 704 F.3d at 666.

4 To counter Defendants’ myopic interpretation of “servicing” requires a look at the overall
 5 framework within which the provisions relating to QWRs and servicer obligations to respond to
 6 QWRs are couched. This leads to the observation that 12 U.S.C. 2605 is statute titled “Servicing
 7 of mortgage loans and administration of escrow account” and that it begins with a discussion of
 8 disclosures required of a servicer when there has been any “*assignment, sale, or transfer* of loan
 9 servicing.” (emphasis added) In fact, the entire first third of the statute is devoted to the issue of
 10 requirements placed on servicers in the event of servicing *transfers*. See 12 U.S.C. § 2606(a)-(c).
 11 And, contrary to Defendants’ argument that servicing relates solely to “*schedul[ing]* periodic
 12 payments,” the issue of payments is not even mentioned until subsection (d) of the statute and
 13 then only in passing. In coming to its holding regarding servicer obligations to respond to
 14 QWRs, the *Catalan* court (upon which the Ninth Circuit’s *Medrano* decision relied), similarly
 15 noted this fact. As stated by the Court: “RESPA is a consumer protection statute that regulates
 16 the real estate settlement process, including servicing of loans *and assignment of those loans*. See
 17 12 U.S.C. § 2601 (Congressional findings).” 629 F.3d at 680 (emphasis added).

18 As such, Defendants’ assertion that it was not required to respond to Plaintiffs’ QWR
 19 relating to the MERS MIN Summary and MERS Milestones Report, is disingenuous. As is clear
 20 from the framework of the entire RESPA statute and 12 U.S.C. § 2605 in particular, transfers of
 21 loans are part and parcel of and directly related to the “servicing” of a loan. Defendants
 22 themselves acknowledge that the “MERS Summary and Milestone Reports track the transfer of
 23 ownership and servicing as it relates to the loan.” Def. Mtn. at p. 9. As such, such reports related
 24 directly to the issue of servicing and Defendants were required to respond under § 2605(e).

25 Though Defendants also attempt to cite *Medrano* in support of its contention that it was
 26 not required to respond to Plaintiffs’ inquiry, their argument fails. In *Medrano*, the borrower
 inquiries related to “challenges to the terms of the [original] loan and mortgage documents,” and

1 did not therefore relate to the servicing of the loan. 704 F.3d at 667. In direct contrast, Plaintiffs' 2 QWR inquiries related directly to the servicing transfers that occurred on their loan as would be 3 evidenced by the MERS Summary and Milestone Reports. As such, Caliber was required to 4 respond and their failure to do so constituted a violation of § 2605(e).

5 Caliber further violated RESPA by failing to provide Plaintiffs with a loan identification 6 number that was assigned to their loan and through which the trustee would recognize Plaintiffs' 7 loan account, and by failing to supply Plaintiffs with the contact information of an officer under 8 the trustee's employ. § 2605(e) specifically requires a servicer to provide borrowers with "the 9 name and telephone number of an individual employed by, or the office or department of, the 10 servicer who can provide assistance to the borrower." 12 U.S.C. § 2605 (e)(2)(c)(ii). Caliber's 11 Motion also fails because it fails to specify the ways in which Plaintiffs' inquiry regarding the 12 servicing file of their loan was overbroad or unduly burdensome. As such, its arguments fail and 13 its motion should be denied.

14

15 **C. Plaintiffs Have Stated Facts Sufficient to State a Claim for Wrongful**
Foreclosure

16 As a preliminary matter, Plaintiff contends that a wrongful foreclosure action is not only 17 properly brought after a foreclosure sale has already occurred. Numerous courts have evaluated 18 wrongful foreclosure claims where it has been alleged that the foreclosing party lacks standing to 19 foreclose as the prejudice that could result to the borrower is clear. *See Tamburri v. Sun Trust*
Mortgage, Inc. (2011) 2011 WL 6294472 *14 (the threat of foreclosure by the wrong party 20 would certainly be sufficient to constitute prejudice to the homeowner because there is no power 21 of sale without a valid notice of default"); *see also Castillo v. Skoba*, 2010 WL 3986953 at*2 22 ("The power of sale in a nonjudicial foreclosure may only be exercised when a notice of default 23 has first been recorded.... [A]ny foreclosure sale based on a void notice of default is also void."). 24 In the same way, in *Sacchi v. Mortgage Electronic Registration Systems, Inc.* 2011 WL 2533029, 25 the *Sacchi* Court expressed dismay when confronted with the argument that someone can seek 26 and obtain a foreclosure sale of one's home regardless of whether that entity had any legal

1 authority to foreclose. *Id.* at 7.

2 Moreover, though Plaintiffs acknowledge that the California Supreme Court – in its
 3 seminal decision in *Yvanova v. New Century Mortgage Corp.* (2016) 62 Cal.4th 919 – did not
 4 address the issue of whether or not a borrower could preempt a threatened nonjudicial
 5 foreclosure by a suit questioning the foreclosing party’s right to proceed, it is also significant to
 6 note that the Court’s holding did not bar such suits. Rather, the reasoning applied by *Yvanova* to
 7 grant standing to borrowers challenging the authority of a foreclosing entity to foreclose based
 8 on allegation of a void (as opposed to a voidable) assignment, are equally applicable to a pre-
 9 foreclosure lawsuit. As established by California’s high Court, “the principle that only the entity
 10 currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that
 11 debt is not, or at least should not be, controversial. It is a ‘straightforward application[] of well-
 12 established commercial and real-property law: a party cannot foreclose on a mortgage unless it is
 13 the mortgagee (or its agent).’” 62 Cal.4th at 928, citing Levitin, *The Paper Chase: Securitization,*
 14 *Foreclosure, and the Uncertainty of Mortgage Title* (2013) 63 Duke L.J. 637, 640. “The
 15 borrower owes money not to the world at large but to a particular person or institution, and only
 16 the person or institution entitled to payment may enforce the debt by foreclosing on the security.
 17 It is no mere ‘procedural nicety,’ from a contractual point of view, to insist that only those with
 18 authority to foreclose on a borrower be permitted to do so. [citation]” *Id.* at 938. “The mortgage
 19 contract is not simply an agreement that the home may be sold upon a default on the loan.
 20 Instead, it is an agreement that if the homeowner defaults on the loan, the mortgagee may sell the
 21 property pursuant to the requisite legal procedure. [citation]” *Id.* As such, Plaintiffs maintain that
 22 those who lack standing to foreclose on their property cannot lawfully proceed with the
 23 foreclosure.

24 Defendants’ reliance on *Gomes v. Countrywide* (2011) 192 Cal.App.4th 1149, 1155 in
 25 support of this proposition is also inapposite. Despite Defendants’ reliance on the language of
 26 *Gomes*, it fails to note that the court in that very same decision recognized the legitimacy of such
 challenges to a foreclosing entity to foreclose where there was a “specific factual basis for

1 alleging that the foreclosure was not initiated by the correct party.” *See Id.* at 1154 (discussing
 2 three cases that recognized the right to bring a legal challenge to the standing of a party to
 3 foreclose); *see also Herrera v. Deutsche Bank National Trust Co.* 196 Cal.App.4th 1366, 1378-
 4 1379 (2011) (denying bank summary judgment on wrongful foreclosure claim because it failed
 5 to show a chain of ownership that would establish it as the true beneficiary under the deed of
 6 trust); *Glaski v. Bank of America, N.A.*, 218 Cal.App.4th 1079, 1097 (upholding the right of a
 7 homeowner to raise questions regarding the chain of ownership by contending that defendants
 8 were not the lenders or beneficiaries and did not have the authority to foreclose); *Barriónuevo v.*
 9 *Chase Bank, N.A.*, 885 F.Supp.2d 964, 972 (N.D. Cal. 2012) (“[O]nly the ‘true owner’ or
 10 ‘beneficial holder’ of a Deed of Trust can bring to completion a nonjudicial foreclosure under
 11 California law...Several courts have recognized the existence of a valid cause of action for
 12 wrongful foreclosure where a party alleged not to be the true beneficiary instructs a trustee to file
 13 a Notice of Default and initiate nonjudicial foreclosure.”); *Ohlendorf v. Am. Home Mortg.*
 14 *Servicing*, 279 F.R.D. 575, 583 (E.D. Cal. 2010) (allowing the homeowner to pursue a claim for
 15 wrongful foreclosure where the foreclosing party relied on a series of backdated transfers of a
 16 deed of trust’s beneficial interest to pursue foreclosure); *Javaheri v. JP Morgan Chase Bank,*
 17 *N.A.*, 2011 U.S. Dist. Lexis 62152 at * 12-14 (C.D. Cal. June 2, 2011, No. CV10-08185ODW)
 18 (upholding a claim for wrongful foreclosure based on allegations that lender sold promissory
 19 note to investment pool, thereby precluding lender’s successor in interest from obtaining the note
 20 when it acquired the original lender’s assets).

21 As such, it is clear that *Gomes* was never meant to be cited for the blanket proposition
 22 that borrowers may never challenge the authority of a foreclosing entity to foreclose. Rather,
 23 where here, Plaintiffs have alleged a “specific factual basis” demonstrating the lack of Wells
 24 Fargo’s authority to foreclose – namely, LSF9 Master Participation Trust’s status as a mere
 25 participation agent to the securitization of Plaintiffs’ loan and not the full beneficiary of their
 26 deed of trust, even under *Gomes* Plaintiffs would have stated a valid claim for wrongful
 foreclosure.

1 Plaintiffs' wrongful foreclosure claim is premised on this very type of challenge and their
 2 allegations are supported by a clear and specific factual basis. Plaintiffs are not embarking on a
 3 mere fishing expedition to discover *if* there are any grounds upon which to challenge the
 4 authority of Defendants to foreclose. Rather, Plaintiffs are alleging that Defendants *do not* have
 5 the authority to foreclose because LSFP Master Participation Trust is not the owner of beneficial
 6 interest in Plaintiff's mortgage.

7 Finally, Plaintiffs' wrongful foreclosure claim is not barred by the tender requirement.
 8 This argument fails because California courts have clearly established that tender is not required
 9 where the foreclosure sale would be void and not merely voidable. *See Dimock v. Emerald*
 10 *Properties, Inc.* (2008) 81 Cal.App.4th 868; *Lona v. Citibank, N.A.* (2011) 202 Cal. App. 4th 89;
 11 *Tamburri v. Suntrust Mortgage, Inc.* (N.D. Cal. 2011) 2011 WL 6294472, *4 ("where a sale is
 12 void, rather than simply voidable, tender is not required"). Plaintiffs' complaint alleges facts
 13 suggesting that the 2014 assignment on which Defendants premised their foreclosure was void
 14 and not merely voidable because the receiving entity did not own the beneficial interest in
 15 Plaintiffs' loan but was merely a participation agent in the transaction.

16 As such, Defendants' arguments are inapposite and their Motion should be denied.

17 **D. Plaintiffs Have Stated Facts Sufficient to State a Cause of Action for**
Violations of California Civil Code § 2924.17

19 As with Defendant's arguments with respect to Plaintiff's wrongful foreclosure claim,
 20 Defendants move to dismiss Plaintiff's claim for violation of California Civil Code Section
 21 2924.17 ("Section 2924.17") on the grounds that Plaintiffs lack standing to bring such a
 22 challenge. Such an argument is based on Defendants' misunderstanding of the HBOR provisions
 23 and their misguided conflation of Plaintiffs' wrongful foreclosure claim with Plaintiffs' claims of
 24 Defendants' Section 2924.17 violations. Section 2924.17 has nothing to do with contesting a
 25 beneficiary's right to foreclose. Rather, it was enacted to address the issue of robo-signing, a
 26 rampant unscrupulous practice where by lenders and servicers employed the use of individuals to

execute recorded documents despite lacking the knowledge and competency to do so.

To allege a Section 2924.17 violation, the only standing that is required is that the plaintiff be a borrower to whom the HBOR provisions apply. Plaintiffs fall within the protections of the HBOR and, as such, no more is required to demonstrate standing to bring a claim under Section 2924.17.

As such, Defendants' Motion should be denied.

V. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court deny Defendants' Motion to Dismiss Plaintiff's Complaint in its entirety or grant leave to amend if the Motion to Dismiss is granted.

/s/ Clarisse Chung
Clarisse Chung
Crossroads Legal Group
Michael Yesk
Yesk Law
Attorneys for Plaintiffs